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No. 02-1057

In The

Supreme Court of the United States

DON ROPER, Superintendent, Potosi Correctional Center,

Petitioner,

vs.

WILLIE SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the court below erred in determining that Respondent's penalty phase counsel was ineffective for making the objectively unreasonable decision not to present any of the already available mitigating evidence on Respondent's behalf.

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the U.S. Court of Appeals (Pet. App. A6-A30) is reported at 299 F.3d 929 (8th Cir. 2002). The unpublished opinion of the district court is reproduced at Pet. App. A40-A149. The opinion of the Missouri Supreme Court (Pet. App. A152-A195) is reported at 955 S.W.2d 729 (Mo. 1997).

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 2002. The petition for a writ of certiorari was filed on January 6, 2003. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

REASONS FOR DENYING THE WRIT

Petitioner challenges the determination of the court below that Respondent received ineffective assistance from penalty phase counsel. The court below overturned both of Respondent's death sentences. Petitioner, however, chose to pursue a writ of certiorari in this case only, while allowing a sentence of life imprisonment to stand in Respondent's other case.

Additionally, the court below based its decision upon the fact that the Missouri Supreme Court's conclusions concerning the evidence presented during the penalty phase were "completely inaccurate." (Pet. App. A-19). The lower court's conclusion that penalty phase counsel was ineffective is amply supported by the record and does not

conflict with any decision of this Court or of any other court of appeals.

A. The Eighth Circuit's holding does not erase the line between investigation and trial strategy that this Court identified in *Strickland*.

In *Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court held that a defendant alleging ineffective assistance of counsel must not only show that his counsel was not functioning in accordance with the Sixth Amendment so as to provide reasonably effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial because of a reasonable probability that, but for counsel's errors, the result would have been different. In so holding, this Court recognized the difference between counsel's pretrial investigation and counsel's strategic choices at trial. This Court correctly noted that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, however, does not protect the unreasonable decisions in this case.

Moreover, the Eighth Circuit's opinion is entirely consistent with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, this Court quoted, with approval, the district judge's finding that " . . . tactics as a matter of reasonable performance could not justify the omissions," when considering counsel's failure to present mitigating evidence. No further review of the Eighth Circuit's opinion is necessary to implement the standards previously set forth in this Court's decisions.

The Eighth Circuit's holding is in complete accord. Its decision simply reaffirmed that some trial strategy decisions

are so unreasonable that they form the basis of a claim of ineffective assistance of counsel. This principle is well recognized. See *U.S. v. Villapando*, 259 F.3d 934, 939 (8th Cir. 2001); *Crotts v. Smith*, 73 F.3d 861, 866 (9th Cir. 1996); *Ward v. United States*, 995 F.2d 1317, 1318-19 (6th Cir. 1993).

The argument advanced by Petitioner is not new. In *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. 1994), the State of Missouri contended that any action taken by an attorney, if part of the attorney's trial strategy, cannot support a claim of ineffective assistance of counsel. The *McCarter* court correctly held that "[t]he wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion." *Id.* Relying upon *Strickland*, the *McCarter* court reaffirmed that the constraints imposed on trial counsel concerning strategy are that counsel's actions must be reasonable under prevailing professional norms. *Id.*

Here, penalty phase counsel's decision not to present evidence was completely unreasonable and denied Respondent effective assistance of counsel. Had such evidence been presented, Respondent showed that the likely result would have been different.

B. The Eighth Circuit Court of Appeals' decision is not contrary to *Strickland* and *Williams* and does not permit federal judges to replace counsel's strategic trial decisions.

As stated earlier, the Eighth Circuit's decision is not contrary to *Strickland* and *Williams*. It reaffirmed that some trial strategy decisions are so unreasonable that they can support a claim of ineffective assistance of counsel.

Petitioner incorrectly argues that the Eighth Circuit has erased the distinction between investigation and strategy and that federal judges will now supervise, post hoc, all aspects of trial strategy. Disregarding the fact that post-conviction proceedings require the reviewing court to review all decisions in hindsight, the law allows for the review of counsels' trial strategy decisions.

In *Lytle v. State*, 762 S.W.2d 830, 834 (Mo. App. 1988), the Missouri Court of Appeals recognized that trial strategy decisions can form the basis of ineffective assistance of counsel claims, albeit such instances will be rare. While most such challenges will be denied, it only makes sense that the opportunity to attack counsel's strategy decisions exists when appropriate. Accordingly, Petitioner's claims are unfounded.

C. The question posed here needs no resolution.

Petitioner correctly notes that the question presented in *Wiggins v. Corcoran*, No. 02-311 is different from that presented here. Despite Petitioner's assertions to the contrary, for the reasons already stated, the issue presented here has already been resolved and does not warrant re-examination by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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